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A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement

Chris Jenks

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A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement

CHRIS JENKS*

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* Lieutenant Colonel, U.S. Army Judge Advocate General's (JAG) Corps. LL.M. with distinction, Georgetown University Law School (2009); LL.M., The Judge Advocate General's Legal Center and School (2006); J.D., University of Arizona College of Law (2001); B.S., United States Military Academy (1992). Currently assigned as the Chief of the International Law Branch, the Office of The Judge Advocate General, Rosslyn, VA. The views expressed in this article are those of the author and not The Judge Advocate General's Corps, the U.S. Army, or the Department of Defense. Special thanks to Georgetown Law Professors David Stewart and Pat Prugh for their encouragement in pursuing this topic.

I. INTRODUCTION

On November 17, 2008, representatives from the United States and the Republic of Iraq signed an agreement¹ which, while not styled as such, is generally considered a Status of Forces Agreement (SOFA).² The SOFA entered into force on January 1, 2009³ and established the

1. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf [hereinafter Iraq SOFA]. There are two versions of the Iraq SOFA, one in English and one in Arabic, both of which are “equally authentic.” *Id.* art. 30. Technically the representatives signed two agreements, the other being a “Framework Agreement for a Relationship of Friendship and Cooperation.” Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and Republic of Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://www.usf-iraq.com/images/CGs_Messages/_strategic_framework_agreement.pdf [hereinafter Strategic Framework Agreement].

2. Most commentators, including the Congressional Research Service both before and after the agreement was concluded, and the Council on Foreign Relations after, refer to the agreement as a SOFA. *See* CHUCK MASON, CRS REPORT FOR CONGRESS: STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW MIGHT ONE BE UTILIZED IN IRAQ? (2008) [hereinafter CRS], *available at* <http://fpc.state.gov/documents/organization/107217.pdf>; CHUCK MASON, CONGRESSIONAL RESEARCH SERVICE: U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT (2008), *available at* <http://fpc.state.gov/documents/organization/115935.pdf>; Greg Bruno, *U.S. Security Agreements and Iraq*, COUNCIL ON FOREIGN RELATIONS, Dec. 23, 2008 [hereinafter CFR], <http://www.cfr.org/publication/16448/>. Moreover, as discussed *infra* Part III, the agreement meets the Department of Defense’s (DoD) definition of a SOFA. Finally, given that the agreement meets even a general definition of a SOFA, it is referred to as such in this article. *See* Paul J. Conderman, *Status of Armed Forces on Foreign Territory Agreements (SOFA)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010) (defining a SOFA as “an agreement defining the legal position of a visiting military force deployed in the territory of a friendly State.”); *but see* Trevor A. Rush, *Don’t Call It A SOFA! An Overview of the U.S.-Iraq Security Agreement*, ARMY LAWYER, May 2009, at 34 (arguing, as the title suggests, that the agreement is not properly called a SOFA). However, Rush acknowledges that the most important reason to not refer to the agreement as a SOFA is not substantive but “the significant political sensitivities surrounding the presence of foreign forces in the Middle East.” *Id.* at 35.

3. Iraq SOFA, *supra* note 1, art. 30(4) (stating that the agreement “shall enter force on January 1, 2009, following an exchange of diplomatic notes confirming that the actions by the Parties necessary to bring the Agreement into force in accordance with each Party’s respective constitutional procedures have been completed.”). Prior to the Strategic Framework Agreement and the SOFA, the legal authority for U.S. operations in Iraq was United Nations Security Council Resolution [UNSCR] 1790, which extended the authorization for a multinational force in Iraq until December 31, 2008. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007), *available at* <http://www.iamb.info/pdf/unscr1790.pdf>. UNSCR 1790 was the last of a series of resolutions which provided a mandate for the multinational force first in UNSCR 1546 in 2004, which was extended through UNSCR 1637 (2005) and UNSCR 1723 (2006). *See* Letter from Condoleezza Rice, U.S. Sec’y of State, to Marcello Spatafora, President U.N. Sec. Council (Dec. 10, 2007), S.C. Res. 1790, Annex II, U.N. Doc. S/RES/1790 (Dec. 18, 2007). The Iraq SOFA lists “Measures to Terminate the Application of Chapter VIII to Iraq,” the result being that

legal framework by which U.S. personnel continue to operate in Iraq.⁴ The agreement followed lengthy and contentious negotiations, so much so that media reports in the summer of 2008 claimed that both sides were abandoning the talks.⁵ In addition to reporting on the negotiations themselves, much of the media attention⁶ focused on SOFA provisions that addressed the withdrawal of U.S. troops by the end of 2011⁷ and Iraqi jurisdiction over civilian contractors.⁸ Yet the most contentious

"Iraq should return to the legal and international standing that it enjoyed prior to the adoption of U.N. Security Council Resolution 661 (1990)" Iraq SOFA, *supra* note 1, art. 25. While UNSCR 660 was the first resolution the U.N. Security Council adopted following Iraq's invasion of Kuwait in 1990, UNSCR 661 was the start of U.N. instituted sanctions, sanctions which expired along with the U.N. mandate on December 31, 2008.

4. CRS, *supra* note 2. While the Iraq SOFA is in effect for three years, Article 30 qualifies that, stating "unless terminated sooner by either Party pursuant to paragraph 3 of this Article." Iraq SOFA, *supra* note 1, art. 30. Paragraph 3 states that "[t]his Agreement shall terminate one year after a Party provides written notification to the other Party to that effect." *Id.* art. 30(3). There is also language in Article 24 (Withdrawal of the United States Forces from Iraq) stating that the "[t]he United States recognizes the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time." *Id.* art. 24(4).

5. Karen DeYoung, U.S., *Iraq Scale Down Negotiations Over Forces: Long-Term Agreement Will Fall to Next President*, WASH. POST, July 13, 2008, at A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/07/12/AR2008071201915.html>; see CFR, *supra* note 2 (describing "a contentious accord").

6. See, e.g., CFR, *supra* note 2 (listing the "most discussed" aspects of the Iraq SOFA as: subjecting contractors to Iraq law; U.S. troops withdrawing from Iraqi cities by mid-2009 and from Iraq by the end of 2011; "requirements that U.S. combat troops coordinate missions with the Iraqi government; hand over prisoners to Iraqi authorities; relinquish control of the Green Zone; and give Iraqi authorities the lead in monitoring Iraq airspace").

7. Iraq SOFA, *supra* note 1, art. 24(1) (stating that "All the United States Forces shall withdrawal from Iraqi territory no later than December 31, 2011."); but see discussion *supra* note 4, on the possibility of, and mechanism by which, U.S. forces withdraw earlier than 2011. The SOFA also established June 30, 2009 as a deadline for the withdrawal of U.S. combat forces from "Iraqi cities, villages, and localities." Iraq SOFA, *supra* note 1, art. 24(2). Another date that is incorrectly linked to the SOFA is the withdrawal of U.S. combat forces from Iraq by August 2010. See Nada Bakri, *Four Killed in Deadliest Day for U.S. Troops in Weeks*, WASH. POST, Sept. 9, 2009, at A12 (incorrectly stating that "[u]nder a bilateral security agreement, all U.S. combat troops must leave Iraq by the end of August 2010."). President Obama did announce that he would withdrawal U.S. combat forces from Iraq by August 2010, which as Commander in Chief he is empowered to do, but is not required to under the Iraq SOFA. See Peter Baker, *In Announcing Withdrawal Plan, Obama Marks Beginning of Iraq War's End*, N.Y. TIMES, Feb. 28, 2009, at A6, available at <http://www.nytimes.com/2009/02/28/washington/28troops.html>.

8. Iraq SOFA, *supra* note 1, art. 12(2) (stating that "Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor

issue during the negotiations was reportedly which country would have jurisdiction over U.S. service members and under what circumstances.⁹

Although the Iraq SOFA is in force, the issue of criminal jurisdiction over U.S. service members has largely escaped scrutiny. Seemingly lost amidst politically charged discussions of troop pullouts and claims of private security contractor impunity, the jurisdiction article of the Iraq SOFA marks a radical departure from how jurisdiction over U.S. service members is determined in other SOFAs with countries around the world.¹⁰

The jurisdiction article of the Iraq SOFA states that “Iraq shall have the primary right to exercise jurisdiction over members of the U.S. Forces” but only for “grave premeditated felonies”¹¹ and qualifies that

employees.”). Jurisdiction over contractors has long been a source of tension, highlighted by an incident on September 16, 2007, involving Blackwater contract security contractors in Baghdad’s Nisoor Square. Anne Garrels, *Maliki Calls Blackwater’s Actions a Crime*, NATIONAL PUBLIC RADIO, Sept. 19, 2007, <http://www.npr.org/templates/story/story.php?storyId=14527473>. Blackwater contractors killed at least seventeen Iraqis in Nisoor Square, and according to the Federal Bureau of Investigation, “at least 14 of the shootings were unjustified and violated deadly-force rules in effect for security contractors in Iraq.” David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?_r=1. In July 2009, Iraq exercised its primary right of jurisdiction, or at least started to, detaining five U.S. contractors suspected of the murder of another U.S. contractor. Marc Santora & Alissa Rubin, *5 Americans Arrested in Fatal Stabbing of a Fellow Contractor in Iraq*, N.Y. TIMES, June 7, 2009, at A4, <http://www.nytimes.com/2009/06/08/world/middleeast/08iraq.html>. Iraq released the Americans and so the first instance of Iraq exercising jurisdiction over a foreign security contractor will likely come from an August 2009 incident in Baghdad where a British contractor shot and killed two colleagues, one British and one Australian, and shot and wounded an Iraqi. Ernesto Londoño, *Contractor is Held in 2 Killings in Iraq*, WASH. POST, Aug. 10, 2009, at A7. Another example of the changed conditions for contractors in Iraq post-SOFA took place in September 2009, when Iraqi soldiers detained and beat four U.S. private security contractors in Baghdad. Anthony Shadid, *Scuffle With Security Contractors Highlights Iraqis’ New Clout in Green Zone*, WASH. POST, Oct. 7, 2009, at A11.

9. DeYoung, *supra* note 5.

10. North Atlantic Treaty: Status of Forces art. 7, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]; Treaty of Mutual Cooperation and Security art. 7, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter Japan SOFA]; Facilities and Areas and the Status of United States Armed Forces in Korea art. 12, July 9, 1966, 17 U.S.T. 1677 [hereinafter Korea SOFA].

11. Iraq SOFA, *supra* note 1, art. 12. Article 12 does not enumerate grave premeditated felonies, assigning the task to a Joint Committee. *Id.* art. 12(8). Over a year and a half after concluding the SOFA, and over a year after it entered force, the Joint Committee has not identified what offenses constitute grave premeditated felonies. CHUCK MASON, U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT, CRS Report 7-5700, at 11 (2008), available at <http://fpc.state.gov/documents/organization/128352.pdf>. The report states that “Only after the committee enumerates the [grave premeditated] offenses, and also establishes procedures and mechanisms

even further by adding “when such crimes are committed outside agreed facilities and areas”¹² and “outside duty status.”¹³ In comparison, the jurisdiction articles of previous U.S. SOFAs predicate the primary right of jurisdiction on whether the offense arose “out of any act of omission done in the performance of official duty.”¹⁴ The differences between the Iraq SOFA’s status based construct and the traditional acts or omission framework are not readily apparent, nor are any drastic ramifications of one versus the other. Yet the differences are significant and the ramifications more so.

The duty status construct appears innocuous and straight forward, requiring an analysis of whether the service member was in a duty status at the time of the alleged offense. The first hint of trouble is that the Iraq

consistent with due process standards and protections available under U.S. and Iraqi law, will Iraq be able to assert jurisdiction over U.S. forces.” *Id.* at 8. That Iraq only has primary jurisdiction over U.S. service members for “grave premeditated felonies” is a departure from the traditional acts or omissions SOFA jurisdiction model discussed *infra*. This limitation, while certainly noteworthy, is not the focus of this article. Presumably certain criminal misconduct by U.S. service members, for example rape and murder, would constitute a grave premeditated felony, and thus the limitation is just that—a limitation and not a complete bar. The same cannot be said of the requirement for Iraqi jurisdiction that a U.S. service member be outside duty status, which as discussed in this article will never occur, and thus is essentially a jurisdictional bar. Nonetheless, that grave premeditated offenses remain undefined is itself telling as to whether Iraq and the United States contemplate even the possibility of Iraq exercising jurisdiction over U.S. service members.

12. Iraq SOFA, *supra* note 1, art. 12(1). This temporal qualification of Iraq’s primary jurisdiction over U.S. service members is another limitation and departure from traditional SOFA criminal jurisdiction articles. The impact of this qualification is briefly discussed *infra*, but is not the focus of this article. In short, regardless of how “grave and premeditated” a crime a U.S. service member commits against one or more Iraqis, if the crime takes place within an agreed facility and area, then Iraq does not have primary jurisdiction. But similar to the previous footnote, certain criminal misconduct which occurs outside agreed facilities and areas, would not be subject to the limitation. Ultimately, Iraq’s so called primary right of jurisdiction over U.S. service members is limited in two ways: (1) to grave premeditated offenses; and, (2) when such crimes are committed outside agreed facilities and areas. Any chance of Iraqi jurisdiction which survive those limitations would then fail due to the U.S. service member not being outside duty status, which is either a third limitation, or, as this article contends, a complete bar.

13. *Id.* Although the focus of this article is on U.S. service members, the provisions of article 12, and this article’s analysis, apply equally to civilian component members of the U.S. forces.

14. The sending State holds the primary right to exercise jurisdiction for “offenses arising out of any act or omission done in the performance of official duty.” NATO SOFA, *supra* note 10, at art. VII(3)(a)(ii); Japan SOFA, *supra* note 10, art. XVII(3)(a)(ii); Korea SOFA, *supra* note 10, art. XXII (3)(a)(ii).

SOFA does not define duty status,¹⁵ leaving the determination to the United States.¹⁶ Much more problematic is a possible divergence in the meaning of the term in the English and Arabic versions of the Iraq SOFA and the impact of that divergence on the jurisdictional analysis. Within the U.S. military, duty status is a personnel accountability term that, counter-intuitively, has nothing to do with the actions a service member takes—legal or otherwise.¹⁷ A service member may be in a duty status and commit horrific crimes; one has nothing to do with the other. Under a traditional SOFA criminal jurisdiction framework, a service member may be in a duty status while committing a criminal act, but unless that act arises out of the performance of official duty, the U.S. does not have primary jurisdiction. For example, the crime of rape cannot by definition have a nexus to official duty, and so the U.S. lacks primary jurisdiction over its service members who commit rape in Germany, Japan, or Korea.¹⁸

Whether a nexus between the criminal offense and performance of an official duty exists is not part of, or even relevant to, the duty status construct upon which the Iraq SOFA jurisdiction article is based. Under the SOFA, Iraq may lack primary jurisdiction over U.S. service members even for “grave premeditated felonies” like rape,¹⁹ which the SOFA

15. See Iraq SOFA, *supra* note 1, art. 2 (defining terms used within the SOFA, but not “duty status”).

16. *Id.* art. 12(9) (stating that “United States Forces authorities shall certify whether an alleged offense arose during duty status.”). There is a provision by which Iraqi authorities may request a review of the determination and in turn the U.S. “shall take full account of the facts and circumstances,” none of which changes the underlying point that the United States makes the determination. *Id.*

17. For the U.S. Army’s understanding and use of duty status, see U.S. DEP’T OF ARMY, REG. 600-8-6, PERSONNEL ACCOUNTING AND STRENGTH REPORTING (Sept. 24, 1998) [hereinafter AR 600-8-6], available at http://www.army.mil/USAPA/epubs/pdf/r600_8_6.pdf.

18. See *Soldiers from Detroit, Colorado Springs, Held in German Stabbing*, ASSOCIATED PRESS, Mar. 1, 1995 (describing a 1995 incident in which two U.S. soldiers were arrested for stabbing a German man to death and wounding another. The weekend before the incident, another U.S. Soldier was arrested for stabbing to death a German taxi cab driver); Suvendrini Kakuchi, *Japan/US: U.S. Military Bases Pose Threat to Asian Women*, IPS, Jan. 31, 2007 (detailing past incidents of sexual assault of Japanese women, and in some cases girls, by U.S. service members); *U.S. Soldier Draws Life Term for Murder*, UPI, Apr. 14, 1993 (reporting the life sentence received by a U.S. Army soldier for the 1992 rape and murder of a Korean woman); see also Ian S. Wexler, *A Comfortable SOFA: The Need for An Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 84–85 (2008) (stating that as of 2003, “42 U.S. service members were held in foreign prisons to serve post-trial sentences” around the world).

19. The author assumes that the crime of rape will be considered a grave premeditated felony.

purports to convey to Iraq. Stated more plainly, in the years since the U.S. invaded Iraq, American service members have committed a number of serious and high profile crimes against Iraqis, including rape and murder.²⁰ Yet Iraq did not have jurisdiction over the U.S. service members who committed those violent crimes in Iraq against Iraqi citizens. Going forward under the SOFA, Iraq still lacks jurisdiction; this is likely not the manifestation of sovereignty the Iraqi people envisioned.

Predicating Iraqi jurisdiction on duty status renders Iraqi jurisdiction over U.S. service members illusory. If—and unfortunately more statistically likely when—a U.S. service member in Iraq is accused of a crime of violence against Iraqis between now and December 2011, the fact that Iraq does not have primary jurisdiction will likely generate considerable publicity and will strain the tenuous relationship between the two countries.²¹

The rationale behind using duty status as a basis for jurisdiction may stem from a desire to shield U.S. service members from an Iraqi criminal justice system viewed as incapable of providing a trial which comports to U.S. notions of fair trial safeguards and due process guarantees.²² Whether the use of duty status as a jurisdictional predicate achieves that goal remains to be seen. What seems more likely is that the use will create difficulties for the U.S. in the short term in its dealings in and with Iraq, and in the long term with future SOFA negotiations with other countries.

II. OVERVIEW

This article will examine the Iraq SOFA's use of duty status as a basis for determining which State has primary jurisdiction over U.S. service members for alleged criminal misconduct in Iraq. In the third section, the article will briefly explain what a SOFA is, and how and why they are used, focusing on the North Atlantic Treaty Organization (NATO)

20. See Wexler, *supra* note 18, at 45–47.

21. Karl Meyer, *How to Lose Iraq: Grants of Immunity Have a Long and Unpleasant History in the Middle East, Having Caused Serious Crises*, NEWSWEEK, July 7, 2008, available at <http://www.newsweek.com/id/143674>.

22. Wexler, *supra* note 18, at 77–78 (claiming that “[w]hile perhaps some progress has been made, the Iraqi court system does not appear to possess *any* court that is substantially free from corruption or inappropriate outside influences . . .” (emphasis in original)).

SOFA. This section will also utilize examples of U.S. service member misconduct, both associated with and detached from official duty, to illustrate the application of an acts-based SOFA jurisdiction article. The fourth section turns to the Iraq SOFA's status-based jurisdiction article, exploring how the U.S. military defines duty status and whether using that definition renders the concept of Iraq jurisdiction over U.S. service members a nullity. The fourth section also describes the potential discrepancy between the U.S. and Arabic definitions of duty status and suggests how the law governing treaty interpretation might resolve the conflict. The fifth section discusses possible U.S. motivations for using for a duty status based jurisdiction construct. Ultimately, this article concludes that status-based criminal jurisdiction was borne out of a U.S. belief that the Iraqi judicial system would not adequately protect the rights of U.S. service members. Linking jurisdiction to ever present duty status might seem to benefit the U.S. by allowing exclusive jurisdiction over its service members, but such an assertion will be viewed as over reaching at best, and the benefits are likely politically impossible to retain.

III. SOFA

A. General

To place the magnitude of the departure the Iraq SOFA represents in proper context, understanding the baseline of jurisdiction language and use from the NATO SOFA is helpful. First, a brief discussion on SOFA use, terminology, and purpose is in order. The use of SOFAs is certainly not unique to the United States,²³ although the U.S. is a party to more than 100 SOFAs around the world.²⁴ That the U.S. is a party to so many

23. Numerous other countries utilize SOFAs. For example, in 2006, in conjunction with peacekeeping missions, Australia, New Zealand, Malaysia and Portugal signed a SOFA with East Timor. Timor-Leste Institute for Development Monitoring and Analysis, *Status of Forces Agreements May 2006–January 2007*, <http://www.laohamutuk.org/reports/UN/06SOFAs.html> (last visited Oct. 16, 2009). Nor is the SOFA concept limited to the west, Germany entered into a SOFA with Russia in 2003 to address the transit of Germany troops from Germany to Afghanistan and the former Soviet Union used SOFAs within the Warsaw Pact. See Germany Federal Foreign Office Homepage, Legal Status of Forces in Germany and Abroad, Bilateral Agreements, <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/Truppenstationierungsrecht.html#t4> (last visited Oct. 16, 2009) (describing Germany's SOFA with Russia); George S. Prugh, *The Soviet Status of Forces Agreements: Legal Limitations or Political Devices?*, 20 MIL. L. REV. 1 (1963) (explaining how the former Soviet Union utilized SOFAs).

24. CFR, *supra* note 2 (describing how U.S. officials themselves disagree on how many SOFAs are in effect. Specifically, during congressional testimony in April 2008, the U.S. Ambassador to Iraq testified that the United States has approximately eighty SOFAs worldwide while a February 2008 op-ed co-authored by Secretary of State

SOFAs, and that other countries utilize them as well, reflects the reality of extraterritorial deployment of militaries around the world. The widespread use of SOFAs also speaks to the need to identify and balance risks—of members of the military from one State facing criminal liability in another, and the political liability both States may face as a result. Status of forces agreements provide a framework under which the military from a “sending” State operates within the territory of a “receiving” State.²⁵ States’ attitudes toward criminal jurisdiction under SOFAs tend to vary depending on whether they are a sending or a receiving State.²⁶

Status of forces agreements provide for the rights and privileges the sending State’s military will have in the receiving State by “addressing how the domestic laws of the [receiving State’s] jurisdiction shall be

Condoleezza Rice and Secretary of Defense Robert M. Gates put the number at “more than 115”).

25. STUART ADDY ET AL., *THE HANDBOOK OF THE LAW OF VISITING FORCES* 3–9 (Dieter Fleck ed., 2001). The DoD defines a SOFA as:

An agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state. Agreements delineating the status of visiting military forces may be bilateral or multilateral. Provisions pertaining to the status of visiting forces may be set forth in a separate agreement, or they may form a part of a more comprehensive agreement. These provisions describe how the authorities of a visiting force may control members of that force and the amenability of the force or its members to the local law or to the authority of local officials.

JOINT CHIEFS OF STAFF, JOINT PUB. 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 367 (2009).

26. In the 1998 aircraft incident described *infra* Part III.C., Italy, as a receiving State, unsuccessfully sought jurisdiction over the U.S. military pilots. See Kimberly C. Priest-Hamilton, *Who Really Should Have Exercised Jurisdiction Over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605, 623 (2000). But ten years earlier, Italy, as a sending State, would have been able to assert that a disaster at a German air show involving a midair collision of Italian aircraft which killed seventy arose from official duty acts and thus claim primary jurisdiction (had the Italian pilot who caused the collision survived). Daniel Dumas, *Aug. 28, 1988: Ramstein Air Show Disaster Kills 70, Injures Hundreds*, WIRED, Aug. 28, 2009, <http://www.wired.com/thisdayintech/2009/08/0828ramstein-air-disaster/>. Similarly, in the AVL incident described *infra* Part III.C., the Republic of Korea (ROK), the receiving State, complained of the SOFA terms which allowed the United States both to determine when an act arose out of official duty and then claim primary jurisdiction on those self defined grounds. Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 J. TRANSNAT’L L. & POL’Y 213 (2003). Yet, the ROK, in the role of a sending State, entered into a SOFA with the Republic of Kyrgyzstan which provided ROK military immunity from Kyrgyzstani prosecution. *Id.* at 245–46.

applied” to the sending State’s military.²⁷ Although “SOFAs may include many provisions, . . . the most common issue they address is which country may exercise criminal jurisdiction” over the sending State’s military.²⁸

B. NATO SOFA

While issues of criminal jurisdiction over service members operating in foreign countries extend back centuries,²⁹ the SOFA between the U.S. and other NATO member countries established the criminal jurisdiction paradigm on which other SOFAs the U.S. entered into are based, and from which the Iraq SOFA so radically departs.³⁰ Under that paradigm:

Both the sending and receiving states are generally given exclusive jurisdiction over offenses which violate their own law, but not the law of the other state. Where a crime violates the law of both jurisdictions, a system of priorities is established. The sending state is given the primary right to exercise jurisdiction over its personnel as to offenses arising out of the performance of official duty and offenses solely against its security, property, or personnel. The host nation has primary jurisdiction in all other cases. In cases of particular importance to one state, a waiver of jurisdiction may be obtained.³¹

To illustrate exclusive jurisdiction, consider a U.S. service member stationed in Germany who is absent without leave—what the military would refer to as “going AWOL.”³² A U.S. service member going AWOL is a violation of the sending State’s (U.S.) law but does not violate the receiving State’s (Germany) law. Because the offense is a violation of only

27. CRS, *supra* note 2, at 2. Mr. Mason notes that in the context of SOFAs to which the U.S. is a party, a SOFA generally applies to not just U.S. service members but also DoD civilians. *Id.* Mr. Mason correctly cautions that “the scope of applicability is specifically defined” in each SOFA. *Id.* This article focuses on the applicability of the Iraq SOFA to United States Forces, a term the agreement defines as “any individual who is a member of the United States Army, Navy, Air Force, Marine Corps or Coast Guard.” Iraq SOFA, *supra* note 1, art. 2(3).

28. CRS, *supra* note 2, at 2.

29. For a discussion on the evolution of what came to be known as SOFAs, see John Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT’L L. REV. 291, 294–95 (2006); for a description of the historical development of foreign criminal jurisdiction see Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F.L. REV. 169, 171 (1994) (outlining the development of the “law of the flag” concept by which “a military force operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members.”).

30. NATO SOFA, *supra* note 10, art. VII. With the exception of the NATO SOFA, at least in terms of the United States, SOFAs are “specific to an individual country” and concluded “in the form of an executive agreement.” CRS, *supra* note 2, at 2.

31. ADDY ET AL., *supra* note 25, at 99–101.

32. AWOL is the acronym for absent without leave, a violation of the Uniform Code of Military Justice, 10 U.S.C. § 886, art. 86 (2006) [hereinafter UCMJ].

U.S. law, the U.S. would have exclusive jurisdiction over its service member. Conversely, if the U.S. service member was in downtown Berlin displaying Nazi symbols, Germany would have exclusive jurisdiction over the service member because such a display violates German law and there is no corresponding U.S. criminal prohibition.

Given the requirement for a criminal law unique to one State, exclusive jurisdiction results in a minority of situations. The vast majority of criminal offenses violate the laws of both the sending and receiving State, resulting in each State having concurrent jurisdiction. To establish which State has primary jurisdiction, as the summary above describes, the NATO SOFA established a system of priorities.³³ Where the offense is solely against the sending State's security, property, or personnel, the sending State has primary jurisdiction. For example, assault is a crime under both U.S. and German law. When a U.S. service member stationed in Germany commits assault, both U.S. and German law are violated and both States have jurisdiction. The U.S. has primary jurisdiction where the victim of the assault is another U.S. service member, U.S. dependent, or the offense is solely against U.S. personnel. Similar results occur where a U.S. service member steals U.S. government property. For those cases where the sending State, here the United States, does not have primary jurisdiction, the receiving State, here Germany, would.

The most contentious manner in which primary jurisdiction is determined arises where the "[t]he sending [S]tate is given the primary right to exercise jurisdiction over its personnel as to offenses arising out of the performance of official duty."³⁴ Setting the conditions for future disputes, the committee drafting the NATO SOFA could not reach agreement on how to define official duty.³⁵ Given that, it is perhaps not surprising that the drafting committee also could not agree on whether the sending or receiving State should make the determination of whether

33. ADDY ET AL., *supra* note 25, at 99–101.

34. *Id.*

35. Priest-Hamilton, *supra* note 26. As a result, the NATO SOFA does not define official duty. NATO SOFA, *supra* note 10, art. 1. Priest-Hamilton claims the start point for the disagreement was "because NATO SOFA countries have varying definitions of" an offense committed in the performance of official duty. Priest-Hamilton, *supra* note 26, at 625. Priest-Hamilton lists a working definition of "official duty offense" used during the drafting of the NATO SOFA as "an offence arising out of an act done in the performance of official duty or pursuant to a lawful order issued by the military authorities of the sending state." *Id.* at 623.

an offense was committed in the performance of official duty.³⁶ To provide a basis for comparison with the Iraq SOFA, some examples of how criminal jurisdiction is determined, both for acts involving and not involving official duty, are illustrative.

C. Official Duty

Most crimes by U.S. service members stationed overseas have no nexus to official duty. But when there is such a nexus, the discordant results of the NATO drafting committee's inability to define official duty and the limitations of the duty or acts based approach criminal jurisdiction again surface. The cases under this category tend to involve aircraft or vehicles, as evidenced first by an incident involving a U.S. aircraft in Italy, and second by an incident involving a U.S. armored vehicle in the Republic of Korea (ROK).

On February 3, 1998, a U.S. Marine Corps aircraft, flying off course and lower and faster than its flight plan, severed a cable supporting an Italian ski gondola.³⁷ The gondola dropped approximately 400 feet to the ground, killing the twenty passengers.³⁸ Italian prosecutors charged the U.S. aircrew with manslaughter, but an Italian court dismissed the charges, finding that the U.S. had primary jurisdiction under the NATO SOFA as the criminal offenses arose out of the performance of official duty.³⁹ The incident underscored the debate from the drafting of the NATO SOFA—who defines the scope of official duty and what is the definition? Under the United States' approach, the aircrew's duty that day was to fly the aircraft; that they did so negligently did not alter the fact that the deaths of those in the gondola "arose" out of that duty.⁴⁰ Under Italy's view, the aircrew's duty was not so general: it was not just to fly the aircraft, but to follow the flight plan—fly a certain route, at a certain speed and altitude.⁴¹ In Italy's view, when the aircraft struck and severed the gondola cable, the aircrew was not following the flight plan and thus was not performing its official duty.⁴² The U.S. prosecuted the crew members for manslaughter, but after the pilot was acquitted, the

36. Priest-Hamilton, *supra* note 26, at 625.

37. *Id.* at 605.

38. *Id.*

39. *Id.* at 606.

40. *Id.* at 623–24.

41. *Id.* at 624.

42. *Id.*

manslaughter charge was dropped against the navigator.⁴³ For many, the issue was not the conduct of the U.S. criminal proceedings per se, but that Italy was deprived of an opportunity to hold the crew accountable, as well as the manner in which that deprivation under the NATO SOFA's criminal jurisdiction article occurred.

Much more by comparison than contrast, the Korean example involved a U.S. armored vehicle en route to a training area which ran over and killed two thirteen-year-old Korean girls walking on the side of the road in 2002.⁴⁴ The U.S. asserted that the actions taken by the vehicle's driver and commander arose out of their official duties and asserted primary jurisdiction.⁴⁵ Similar to the Italian example, the ROK, as receiving State, requested that the United States, as sending State, waive primary jurisdiction.⁴⁶ The U.S. declined and tried the two U.S. service members at military courts-martial. In separate proceedings, both U.S. service members were acquitted, igniting a firestorm of controversy over the SOFA on the Korean peninsula.⁴⁷

While the determination that U.S. service members' actions arose from the performance of official duty in Korea seems to mirror that in Italy, the Korea SOFA contains an interesting distinction from the traditional NATO SOFA applicable in Italy. The Korea SOFA "includes additional provisions on the meaning of the performance of official duty."⁴⁸ The Agreed Minutes to the SOFA provide that "the term 'official duty' does not include all acts by U.S. armed forces . . . during duty periods, rather it is meant to apply only to acts that are a function of an individual's duties."⁴⁹ The Understanding to the SOFA provides that "acts that are a substantial departure from those required to perform a particular duty are usually indicative of an act outside of the person's

43. *Id.* at 606–07. Both crewmembers were found guilty of obstruction of justice and conspiracy stemming from the destruction of a videotape of the flight made from an on board camera system. *Id.*

44. Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 Am. U. INT'L L. REV. 1103, 1103–04 (2003); *see also* Lee, *supra* note 26.

45. *See* Lee, *supra* note 26, at 215.

46. *Id.* This was the first time in the then thirty-six year history of the Korea SOFA that the Korean Ministry of Justice requested that the United States waive its primary right of jurisdiction. *Id.*

47. *Id.* at 216.

48. Jung & Hwang, *supra* note 44, at 1133.

49. *Id.*

‘official duty.’”⁵⁰ Yet this distinction does not seem to make much of a difference, to either the process by which official duty is determined or primary jurisdiction is established. The Korea SOFA seems to have shifted more than solved the NATO SOFA’s definitional void. Instead of uncertainty over the definition of official duty in the NATO SOFA, the ambiguity in the Korea SOFA shifted to what constitutes a function of an individual’s duty and the boundaries of “substantial departure.”

D. Acts Not in the Performance of Official Duty

Service member criminal misconduct without a nexus to official duty ranges from lower end assaults and thefts to egregious crimes such as rape and murder. The more violent offenses tend to draw more media attention, but jurisdiction is easily determined: the receiving State has primary jurisdiction over the sending State’s service member.⁵¹ The sending State may request that the receiving State waive its primary right and allow the sending State to prosecute, but the request is just that—a request.⁵² While the U.S. as a matter of policy routinely requests such waivers, the number of U.S. service members incarcerated in foreign jails reflects the fact that the U.S. acknowledges the authority of foreign countries to prosecute U.S. service members pursuant to a SOFA, and that foreign judicial systems can afford fair trial safeguards and due process guarantees.⁵³ By comparison, the terms of the Iraq SOFA call into question whether the U.S. acknowledges Iraqi authority and its capacity to prosecute U.S. service members.

IV. IRAQ SOFA

A. The Meaning of Duty Status

On the face of both the English and Arabic texts, the Iraq SOFA bases Iraqi jurisdiction on “duty status.”⁵⁴ While the U.S. may point to this

50. *Id.*

51. ADDY ET AL., *supra* note 25, at 101.

52. *Id.* at 112.

53. *See* Wexler, *supra* note 18, at 84–85.

54. Iraq SOFA, *supra* note 1, art. 12. The Arabic language term is Halat alwajib, which translates to “duty status” in a broad or general sense. E-mail from Professor Haider Ala Hamoudi, Assistant Professor of Law, University of Pittsburgh School of Law, to Chris Jenks, Lieutenant Colonel, U.S. Army Judge Advocate General’s Corps (Sept. 11, 2009, 13:24:00 EST) (on file with author). Professor Hamoudi is a Middle Eastern studies and Islamic law scholar and native Arabic speaker. If forced to defend the term, the United States could point to the English text version of the SOFA and the

fact as evidence of a “meeting of the minds,” it seems highly unlikely that the U.S. and Iraq agree on the meaning of duty status and particularly on the effect that meaning has in the analysis for which State has the right of primary jurisdiction.⁵⁵

As previously discussed, the SOFA does not define duty status.⁵⁶ While a detailed discussion of the Arabic used and its understood meaning in Iraq is beyond this author’s expertise, it seems safe to assume that the Iraqis did not intend a meaning of duty status which nullifies their right of primary jurisdiction over U.S. service members.⁵⁷ In terms of how the U.S. likely views duty status, it is not clear how the U.S. will define the term, except that under the Iraq SOFA, the U.S. “shall certify whether an alleged offense arose during duty status.”⁵⁸

term “duty status” and the Arabic text version with the term “Halat alwajib” and claim equivalence and corresponding agreement on a status-based jurisdiction construct. *Id.*

55. In further support for a claim that the two States have the same understanding of the jurisdiction article, the United States may also argue that the English and Iraqi texts could have, but do not, use the traditional acts-based language. The English version of that language has been discussed. An Arabic language sentence basing jurisdiction over offenses arising out of the performance of official duty would likely use the term *Ada’ alwajib*, which, unlike the broader *Halat alwajib* used in the SOFA, is a more narrow duty construct and connotes someone performing the functions of their job. E-mail from Professor Hamoudi, *supra* note 54. Essentially, *Ada’ alwajib* would be used for an Arabic language acts based SOFA jurisdiction article. Although the Arabic text uses the broader *Halat alwajib*, Professor Haider asserts that the term is not boundless, which suggests a qualitative element and thus a difference from the categorical nature of the English “duty status.” In Professor Haider’s view, the *Halat alwajib* meaning of duty status would not extend to the example discussed *infra* Part IV.B., U.S. service members leaving checkpoint guard duty to commit rape and murder. *Id.*

56. Iraq SOFA, *supra* note 1, art. 2.

57. Even assuming *arguendo* that during the SOFA negotiations Iraq was aware of, and agreed to, the ramifications of duty status-based jurisdiction over U.S. service members, if, and when, an incident like rape or murder occurs, one can imagine that political realities may cause Iraq to deny knowledge while claiming that the U.S. interpretation is unreasonable.

58. Iraq SOFA, *supra* note 1, art. 12(9). Some may argue that the United States certifying duty status is no different than the United States certifying that an act or omission arose out of the performance of official duty. But there is a difference. Under a *jaded* view, if one considers the sending State as having the ability to stack the jurisdictional deck in its favor by declaring official duty and then claiming a primary right of jurisdiction as a result, such overreaching can only occur in the extremely small number of instances where there is a nexus between misconduct and official duty. So, jurisdictional gamesmanship under the traditional construct would afford the sending State no benefit in instances of rape or murder. By contrast, in the Iraq SOFA, whether a U.S. service member was in a duty status is a threshold jurisdictional determinate for all crimes, even those that one assumes constitute grave and premeditated offenses like rape

It seems a reasonable assumption that the U.S. will default to its own military's understanding and usage of the term. The primary function of the U.S. military personnel system is to "[a]ccount for soldiers and report their duty status."⁵⁹ This system is very much in use in Iraq as it is "a wartime and peacetime military personnel function."⁶⁰ Understandably, the U.S. Army strives for one hundred percent accountability in peace and war.⁶¹ To accomplish this, the U.S. Army has promulgated a detailed regulation entitled "Personnel Accounting and Strength Reporting," which explains in painstaking details the mechanics by which the military characterizes and tracks the duty status of soldiers.⁶²

The problem as applied to the SOFA is that duty status is not a descriptor—it's a category. A service member always has a duty status. What that specific status is varies widely, but there is always a duty status. For example, the Army Regulation includes a two page table listing thirty-two different duty statuses a soldier may be in.⁶³ A separate table, this one three pages long, lists fifty-eight different changes which can occur to the thirty-two base statuses.⁶⁴ Soldiers killed or missing in action have a duty status.⁶⁵ When a soldier has absented himself from the Army or is in jail, they still have a duty status.⁶⁶ The tables reflect personnel accounting labels; they do not describe or evaluate the manner in which a soldier is or is not performing his assigned duties.

Some may argue that construing duty status as referring to just that, duty status, is inappropriate or not what the drafters of the Iraq SOFA intended. First, those are the words the jurisdiction article uses and the drafters elected not to define the term. Second, in the absence of a definition to determine the duty status of members of the U.S. armed forces, how could one not refer to the lengthy and detailed regulation which itself is but an explanation of and guide to the Army's personnel accounting system, the primary purpose of which is to "[a]ccount for

and murder. As a result, for the United States, as sending State, to define duty status is qualitatively different than making official duty determinations under the NATO SOFA.

59. AR 600-8-6, *supra* note 17, at 2.

60. *Id.* at 2.

61. *Id.*

62. *Id.*

63. *Id.* at 9, 10.

64. *Id.* at 10, 11.

65. *Id.* at 9, 10.

66. Straightforwardly enough, the duty status descriptor of a soldier who absented himself without authority is AWOL for "absent without leave." *Id.* The descriptor for a soldier in jail is parsed out between whether the confinement is by military or civilian authorities. *Id.*

soldiers and report their duty status”?⁶⁷ While using the Army personnel system’s understanding of duty status will lead to some problematic results as discussed below, at least everyone, in the U.S. military anyway, understands the term’s meaning and usage. To not define the term in the SOFA and then say it is not “duty status” as in the Army personnel system’s meaning would result in even more confusion and further muddy the jurisdictional analysis.

Others may argue that referring to the already established and well understood military personnel accounting system is reasonable; what is unreasonable is the claim that there is no nexus between duty status and performance of duty. If the drafters’ intent was to parse out actions arising from the performance of official duty, they could have used, but elected against, the standard NATO SOFA language or incorporating some of the interpretative guidance from the Korea SOFA. Ignoring that, even if we assume that duty status must mean, within the personnel system construct, performance of duty, the jurisdiction analysis under the Iraq SOFA does not yield a different outcome.

Within the Army personnel system, soldiers who are in a “present for duty” status are “present for performance of normal duty.”⁶⁸ That seems an attractive option which would avoid most if not all problems. One would not think of a soldier committing a crime as performing normal duties. While perhaps a reasonable assumption, that interpretation fails as it superimposes a qualitative element (how the soldier was performing his duty) within a categorical system that does not consider manner of performance.⁶⁹

B. Implications of the U.S. Meaning of Duty Status

This is perhaps best illustrated by how the personnel system considers, or does not, brief periods of misconduct. The Army’s personnel system utilizes an accounting period that begins at one minute past midnight and ends at midnight for each calendar day.⁷⁰ If a soldier absents himself without leave, as discussed above, the duty status is “AWOL”—but only

67. *Id.* at 2.

68. *Id.* at 10.

69. Providing further evidence that the Army personnel system reflects status and not acts, a soldier is present for duty not only when they are performing normal duty, but also when under arrest in quarters or sick in quarters. *Id.*

70. *Id.* at 2.

for “soldiers who are absent from a place of duty without permission or authorization for more than 24 hours.” This is not to suggest that the offense of AWOL under the Uniform Code of Military Justice (UCMJ) is not committed until after twenty-four hours, because there is no such time requirement.⁷¹ So while a soldier may be prosecuted for being AWOL for less than twenty-four hours, the soldier’s duty status does not change to AWOL until after twenty-four hours has passed. What then is the duty status within the personnel system of a soldier who absents himself for part of a day while deployed to Iraq? Present for duty. Again, that does not mean that the soldier has not violated the UCMJ and is not subject to being punished for the absence, because he or she may well be. That the personnel system categorizes the soldier as present for duty as a general descriptor for a twenty-four hour period in which the soldier was performing duties for part of the time period but AWOL at other times is not relevant to the UCMJ inquiry. It is however relevant to interpreting and applying the jurisdiction article of the SOFA, particularly when the previous example is taken one step further.

Suppose in a twenty-four hour period a group of U.S. service members deployed to Iraq sleeps for the first couple of hours, is awoken, and reports as ordered for an eight hour guard shift at a checkpoint in an Iraqi village. At some point during the guard shift, the soldiers, without authority, leave the checkpoint. They walk to a nearby house and proceed to rape and then murder a fourteen-year-old girl, following which they set fire to her body in an effort to conceal their crimes. They also murder the girl’s mother, father, and sister. Following this horrific but relatively short-lived crime spree, the soldiers return to the checkpoint. In terms of the manner in which they performed their checkpoint duty, words almost fail. One certainly cannot satisfactorily perform guard duties at a checkpoint while several hundred yards away from that checkpoint committing rape and murder. Among the host of crimes the soldiers committed, they were AWOL, having absented themselves without authority from the checkpoint. But in terms of their duty status, given that the AWOL period was less than twenty-four hours and no other duty status applies, within the personnel accounting system the soldiers were present for duty.

Sadly, this example is not fictional but a rough recitation of what transpired in Yousifiayah, Iraq, on March 12, 2006.⁷² At the time there

71. Uniform Code of Military Justice, 10 U.S.C. § 88, art. 86 (2006).

72. Edward Wong, *G.I.’s Investigated in Slayings of 4 and Rape in Iraq*, N.Y. TIMES, July 1, 2006, at A1, A4, available at <http://query.nytimes.com/gst/fullpage.html?>

was not even a question of Iraq prosecuting the U.S. soldiers involved; in fact, the Iraqi Minister of Justice went so far as to request that the U.N. Security Council ensure that the soldiers were held accountable.⁷³ They were. The U.S. Army prosecuted and convicted four of the offenders⁷⁴ and the Department of Justice prosecuted and convicted the fifth in U.S. federal court.⁷⁵ Yet were U.S. service members to commit similar crimes today, the Iraq SOFA's duty status qualifier to what would otherwise be Iraq's primary right of jurisdiction for rape and murder outside agreed facilities results in the U.S. still having the primary right, reducing Iraq to requesting that the U.S. waive the right. Either when such a crime is committed, or perhaps before, Iraq and the U.S. may try to reconcile what are almost certainly different views of the meaning of duty status.

C. Reconciling the Different Meanings of Duty Status

Assuming that a U.S. soldier commits a grave premeditated felony outside the agreed facilities,⁷⁶ the interpretation of duty status will be a

res=9A06E5DC1530F932A35754C0A9609C8B63&sec=&spon=&pagewanted=all Yousifiayah is about fifteen miles southwest of Baghdad, near Mahmudiya.

73. Sameer N. Yacoub, *Iraq Seeks Oversight of Rape-Slaying Case*, NEWSMAX, July 4, 2006, <http://archive.newsmax.com/archives/articles/2006/7/4/55249.shtml>.

74. Paul von Zielbauer, *G.I. Gets 110 Years for Rape and Killing in Iraq*, N.Y. TIMES, Aug. 5, 2007, at A14, available at <http://www.nytimes.com/2007/08/05/us/05abuse.html?hp>. The U.S. Army prosecuted four soldiers for their involvement. *Id.* Three of the principals were sentenced to ninety years confinement, 100 years, and 110 years respectively. *Id.* The U.S. Army also prosecuted a soldier who remained at the checkpoint but served as a lookout; he received twenty-seven months confinement. Joel Roberts, *GI Enters Pleas in Iraq Rape-Murders: U.S. Soldier Pleads Guilty to Lesser Charges in Deadly Attack on Iraqi Teen and Her Family*, CBS NEWS, July 31, 2007, <http://www.cbsnews.com/stories/2007/07/31/iraq/main3116685.shtml>.

75. The fifth soldier, and purported ringleader, Steven Green, had been discharged by the time the crimes came to light and was prosecuted by the Department of Justice. Roberts, *supra* note 74. The Department of Justice announced it would seek the death penalty. Brett Barraouquere, *Jury Set for Ex-soldier's Iraq Slayings Trial*, ARMY TIMES, Apr. 17, 2009, http://www.armytimes.com/news/2009/04/ap_iraq_rape_slaying_soldier_041709w/. While Green was convicted of the crimes, the jury could not reach a unanimous decision about a death sentence, which converted the sentence to five consecutive life terms in prison. Brett Barraouquere, *Ex-Soldier Gets 5 Life Terms in Slaying of Iraqi Family, Rape of Teen Girl*, WASH. POST, Sept. 5, 2009, at A7.

76. Notwithstanding the meaning of duty status at issue in this paper, for Iraq to have primary jurisdiction over a U.S. service member, the offenses must be committed outside agreed upon facilities and areas. Iraq SOFA, *supra* note 1, art. 12(1). Thus, where a U.S. service member rapes or murders an Iraqi national within a designated

critical issue. While the SOFA is not a treaty,⁷⁷ the manner in which treaties are interpreted seems an appropriate way to evaluate the different meanings of duty status. The starting point is the Vienna Convention on the Law of Treaties (VCLT).⁷⁸ The VCLT was the product of the United

facility or area, Iraq would not have primary jurisdiction. The SOFA does define “[a]greed facilities and areas,” but broadly, as “those Iraqi facilities and areas owned by the Government of Iraq that are in use by the United States Forces during the period in which this Agreement is in force.” *Id.* art. 2. Thus, somewhat paradoxically, if U.S. forces are using an area or facility owned by Iraq, then Iraq does not have primary jurisdiction over grave premeditated felonies committed by U.S. forces within those areas and facilities. For example, in September, 2009, a U.S. service member allegedly shot and killed a contractor on Contingency Operating Base (COB) Speicher in Iraq. *Soldier Detained in Contractor’s Shooting Death*, CNN, Sept. 13, 2009, <http://edition.cnn.com/2009/WORLD/meast/09/13/contractor.death.soldier.held/index.html>. Assuming that COB Speicher is an agreed upon facility even if the contractor killed was an Iraqi citizen, Iraq would not have primary jurisdiction over the U.S. service member offender. While the number and size of U.S. facilities and areas is both in a state of flux and subject to other SOFA provisions, that the United States turned over more than thirty facilities to Iraq in the second half of 2008 alone provides an idea of the number of facilities and areas and thus the scope of this jurisdictional exception. Press Release, Multi-National Force-Iraq, Facilities and Areas Passed to the GoI (Dec. 23, 2008) [hereinafter MNFI Release], http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=24523&Itemid=128; see Iraq SOFA, *supra* note 1, art. 5. According to Multi-National Forces Iraq, within the first half of 2009 approximately twenty more facilities will be turned over to the Iraqi government. See MNFI Release, *supra*. Even still, there were over 140,000 U.S. troops in Iraq at the beginning of 2009 and current projections are for at least 130,000 through 2009. *12,000 U.S. Troops Out of Iraq by Fall, Military Says*, CNN, Mar. 8, 2009, <http://www.cnn.com/2009/WORLD/meast/03/08/iraq.troop.withdrawal/index.html>. Given the size of some of the facilities and areas U.S. forces use, and the number of Iraqis who work within, this jurisdictional exception may also prove problematic. See generally Global Security, *Iraqi Facilities*, <http://www.globalsecurity.org/military/facility/iraq-intro.htm> (last visited Oct. 16, 2009) (listing the number and size of U.S. facilities in Iraq). While this information is as of mid-2005 and thus out of date, it depicts how the 148,000 U.S. soldiers were located on over 100 bases throughout Iraq. Assuming that Multi-National Forces-Iraq did in fact turn over twenty facilities in the first half of 2009, that plus the previous thirty, still total less than half the U.S. facilities in Iraq. While labeling such facilities as immune from Iraqi prosecution is overstating things, that Iraq lacks primary jurisdiction over offenses against its own nationals within facilities and areas located in Iraq is yet another departure from traditional SOFA jurisdiction. Such an exception is also noticeably absent from either the NATO SOFA or the U.S. SOFAs with Japan and Korea. See NATO SOFA, *supra* note 10, art. VII; Japan SOFA, *supra* note 10, art. XVII; Korea SOFA, *supra* note 10 art. XXII.

77. For a discussion about whether the SOFA rose to the level of a treaty within the U.S. meaning of the term, see Steve Inskeep & Guy Raz, *U.S., Iraq Ponder Long-Term Treaty*, NATIONAL PUBLIC RADIO, Jan. 24, 2008, <http://www.npr.org/templates/story/story.php?storyId=18368586>. Interestingly, the U.S. Department of State listed both the SOFA and the Strategic Framework Agreement in its November 2008 Treaty Report. U.S. DEP’T OF STATE, TREATY ACTIONS (2008), <http://www.state.gov/documents/organization/121092.pdf>.

78. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

Nations International Law Commission's efforts to codify customary international law.⁷⁹ The VCLT, as a general proposition, is considered to reflect customary international law, both by States Parties to the treaty and non-parties.⁸⁰ The VCLT "includes among other things, three articles on the interpretation of treaties."⁸¹ Of those three articles, Article 31 provides a general rule of interpretation;⁸² Article 32 outlines supplementary means of interpretation;⁸³ and Article 33 addresses interpretation of treaties authenticated in two or more languages.⁸⁴

Beginning with Article 31, the first section of the general rule states, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."⁸⁵ The stated scope and purpose of the Iraq SOFA is contained in Article 1, "[t]his Agreement shall determine the principal provisions and requirements that regulate the temporary presence, activities, and withdrawal of the U.S. Forces from Iraq."⁸⁶ Because the purpose of the SOFA does not provide relevant insight, under Article 31 we next turn to the preamble to the SOFA for additional context.⁸⁷ The preamble to the Iraq SOFA affirms that cooperation between the U.S. and Iraq "is based on full respect for the sovereignty of each"⁸⁸ The U.S. interpretation of "duty status"

79. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 6 (2d ed. 2007).

80. For example, the United States is not a party to the VCLT. Although the United States signed the VCLT in 1970, the treaty has remained in the Senate Foreign Relations Committee for its advice and consent since 1971, and the President has not ratified the VCLT. The Department of State acknowledges that because the U.S. has not ratified the VCLT, the United States is "not legally bound by its provisions" but that "[n]evertheless, the United States follows many of the rules in the VCLT in the conduct of its day-to-day work on treaties." U.S. Dep't of State, International Legal Authorities, <http://www.state.gov/s/l/treaty/authorities/international/> (last visited Oct. 16, 2009). In referring to the world community's acceptance of the VCLT as reflecting customary international law, in somewhat indirect fashion, one commentator noted that "[t]here as yet been no case where the [International Court of Justice] has found that the [VCLT] does not reflect customary law." AUST, *supra* note 79, at 13.

81. ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 2 (2007).

82. VCLT, *supra* note 78, art. 31.

83. *Id.* art. 32.

84. *Id.* art. 33.

85. *Id.* art. 31(1).

86. Iraq SOFA, *supra* note 1, art. 1.

87. VCLT, *supra* note 78, art. 31(2).

88. Iraq SOFA, *supra* note 1, at 1.

virtually excludes the possibility of Iraq having primary jurisdiction over U.S. service members, which is hardly indicative of full respect for Iraqi sovereignty. Thus while not clear cut, even applying just Article 31 of the VCLT, the likely Iraqi interpretation of “duty status” of some nexus to the performance of official duties seems more in line with the context in which the two countries agreed to the SOFA in the first place.⁸⁹

Article 32 outlines supplementary means of interpretation to be used to either “confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”⁹⁰ The significance of Article 32 as applied to the SOFA is twofold. First, it allows for the circumstances of the SOFA’s conclusion to be considered. The circumstances were a change in the status quo between the U.S. and Iraq. Prior to the SOFA, Iraq lacked jurisdiction over U.S. service members. That and other aspects of the United States’ presence in Iraq were supposed to change, at least somewhat, through the SOFA. Otherwise, why have a criminal jurisdiction article in the SOFA? Interpreting duty status to essentially mean the status quo ante, that Iraq lacks primary jurisdiction, seems to ignore the circumstances under which the U.S. and Iraq agreed to the SOFA. The second significance of Article 32 is its applicability when Article 31 is applied in such a way as to “lead to a result which is manifestly absurd or unreasonable.”⁹¹

Were the U.S. to argue its interpretation of duty status, Iraq would likely claim that result is unreasonable, if not absurd. Iraq would argue that the beginning of the SOFA’s jurisdiction article “recognizes Iraq’s sovereign right to determine and enforce the rules of criminal and civil law in its territory.”⁹² The first numbered paragraph dictates that “Iraq *shall* have the primary right of jurisdiction over members of the U.S. Forces”⁹³ To then qualify Iraq’s right of primary jurisdiction, a right Iraq “shall have,” on an interpretation of the term duty status such that Iraq will never have primary jurisdiction is, to put it mildly, unreasonable.⁹⁴

89. Article 31 of the VCLT states that “[a] special meaning shall be given to a term if it is established that the parties so intended.” VCLT, *supra* note 78, art. 31(4). Thus the United States and Iraq could have, but through either design or neglect, did not define duty status.

90. *Id.* art. 32.

91. *Id.* art. 32(b).

92. Iraq SOFA, *supra* note 1, art. 12.

93. *Id.* art. 12(1) (emphasis added).

94. Some may go so far as to say that the U.S. would be in violation of one of the oldest maxims of international law, “pacta sunt servanda.” Literally translated as “agreements

Finally, Article 33 would apply because the SOFA is authenticated in both English and Arabic.⁹⁵ Under Article 33, “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”⁹⁶ Because the SOFA does not provide that either the English or the Arabic text will prevail in case of divergence, the two texts are considered equally authoritative. Additionally, the terms used “are presumed to have the same meaning in each authentic text.”⁹⁷ Article 33 directs the application of Articles 31 and 32 and, where such application does not remove the difference of meaning, provides that the meaning which best reconciles the texts shall be adopted. In applying Article 33, regard must always be given to the object and purpose of the treaty.⁹⁸ Applying principles of treaty interpretation renders the U.S. definition of duty status that much more dubious. It also raises the question why the U.S. chose to journey down a linguistic path so obviously fraught with problems.

V. U.S. MOTIVATION FOR STATUS BASED CRIMINAL JURISDICTION

Given the difficulties with Iraq and the media which are likely to arise when the full import of the duty-status-jurisdiction construct is finally known, why did the U.S. pursue such a radical departure from the traditional acts-based jurisdiction of the NATO SOFA? The answer may be summed up by one commentator who, prior to the Iraq SOFA, qualified his call for an equitable foreign criminal jurisdiction agreement by stating:

must be kept”; the maxim is codified in the VCLT article 26, which states that for agreements in force, like the Iraq SOFA, performance by the parties must be in good faith. VCLT, *supra* note 78, art. 26. This author does not allege bad faith performance of the U.S., performance by the U.S. may well be in good faith, but even good faith performance of the duty status construct will not change the problematic nature of its application.

95. *Id.* art. 33.

96. VCLT, *supra* note 78, art. 33(1).

97. *Id.* art. 33(3).

98. *Id.* art. 33(4).

Despite the significant political advantages of negotiating an Iraq SOFA that concedes jurisdiction for a very limited category of cases, the U.S. government should be extremely reluctant to subject any U.S. service members to the Iraq criminal judicial system without significant caveats [T]he Iraqi legal system is vastly different from the U.S. in terms of the fundamental protections given the accused, the lack of an adversarial process and the authority and professionalism of the judiciary. In addition, corruption, religious influence, bias against foreigners, ignorance or disdain for the rule of law amongst judges, and significant security threats are all attendant in day-to-day activities of the Iraqi courts. Unfortunately, it is a system that would be anathema to the average U.S. citizen's perception of justice.⁹⁹

While deficiencies in the Iraqi criminal justice system may be the reason,¹⁰⁰ the U.S. is nonetheless in what will eventually become, if it is not already, an untenable position. The U.S. invaded and subsequently occupied Iraq over seven years ago.¹⁰¹ At some point, Thomas Friedman's admonishment should apply: "The first rule of any Iraq invasion is the pottery store rule: you break it, you own it. We break Iraq, we own Iraq—and we own the primary responsibility for rebuilding a country of 23 million people that has more in common with Yugoslavia than with any other Arab nation."¹⁰² In terms of criminal procedure and law, Iraq may have been "broken" long before the U.S. invaded, but in the seven years since the invasion, and despite hundreds of millions of dollars spent on numerous and varied "rule of law" programs,¹⁰³ Iraq's Central Criminal Court "is seriously failing to meet international standards of due process and fair trials."¹⁰⁴ Since the U.S. invasion, Iraq has continued

99. Wexler, *supra* note 18, at 85–86.

100. Notwithstanding those deficiencies, there are a host of substantive differences between how the United States and Iraq view justice. See Dan E. Stigall, *Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction*, 29 LOY. L.A. INT'L & COMP. L. REV. 1 (2007) (providing a review of Iraqi criminal and civil law and U.S. efforts to change aspects of both).

101. Rajiv Chandrasekaran & Thomas E. Ricks, *U.S. Airstrikes Open War on Iraq; Baghdad Hit in Early Morning as Ground Troops Prepare to Cross Border*, WASH. POST, Mar. 20, 2003, at A1.

102. Thomas Friedman, *Present at . . . What?*, N.Y. TIMES, Feb. 12, 2003, at A37, available at <http://www.nytimes.com/2003/02/12/opinion/presentatwhat.html?scp=5&sq=%22pottery%20store%20rule%22&st=cse>.

103. See Armand Cucciniello, *Iraq Proves Fertile Ground for Rule of Law Programs*, U.S. EMBASSY-BAGHDAD, Mar. 18, 2008, <http://iraq.usembassy.gov/root/pdfs/iraq-rule-of-law-progs-18-march.pdf> (describing various U.S. sponsored rule of law programs on which the Department of Justice alone is spending \$100 million a year); see also U.S. Inst. of Peace, *Strengthening the Rule of Law in Iraq: Projects*, <http://www.usip.org/programs/initiatives/strengthening-rule-law-in-iraq/projects> (last visited Oct. 16, 2009) (describing USIP's Rule of Law in Iraq in a wide range of areas, including constitutional development, judicial independence, property law, and transitional justice).

104. In December 2008, Human Rights Watch reported that the Central Criminal Court of Iraq, "[f]ar from serving as a model criminal justice institution . . . has failed to provide basic assurances of fairness, undermining the concept of a national justice

to prosecute its own citizens through a criminal justice system which, whatever its deficiencies, the U.S. has allowed to continue. Yet when the issue is Iraq prosecuting U.S. service members, that same system, despite all the assistance over the last seven years, does not comport to U.S. concepts of a fair trial.¹⁰⁵

Perhaps implicit in the duty status construct is that it would be problematic domestically for the U.S. to have Iraq prosecuting U.S. service members. Using the traditional acts-based jurisdiction language of NATO would not solve, and could possibly worsen, that problem. That is because while jurisdictional disputes are relatively rare among sending and receiving states over the parameters of official duty, like the Italy and Korea examples previously discussed demonstrate, applying the same standard to Iraq would be anything but dispute free. The U.S. SOFAs with NATO, Japan, and the Republic of Korea were post conflict agreements concluded years after hostilities ended,¹⁰⁶ while the situation in Iraq is far less settled.¹⁰⁷ One former U.S. Army official outlined the differences to the U.S. Congress by explaining that:

system serving the rule of law.” HUMAN RIGHTS WATCH, THE QUALITY OF JUSTICE FAILINGS OF IRAQ’S CENTRAL CRIMINAL COURT 1 (2008), <http://www.hrw.org/sites/default/files/reports/iraq1208web.pdf>.

105. U.S. DEP’T OF DEFENSE DIRECTIVE, STATUS OF FORCES POLICY AND INFORMATION, No. 5525.1, at 1 (2003) [hereinafter DODD]. The DODD “establishes DoD policy and procedures on trial by foreign courts and treatment in foreign prisons of United States military personnel. . . .” The DODD also states that:

[f]or each foreign country where U.S. Forces are subject to the criminal jurisdiction of foreign authorities, the designated commanding officer for each country shall make and maintain a current study of the laws and legal procedures in effect This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States.

Id. at 3. It is unclear whether such a study has been done on Iraq. An enclosure to the DODD lists seventeen “fair trial guarantees” which are “intended as a guide” for the country law studies. *Id.* at 15.

106. The NATO SOFA was signed in June 1951, roughly six years after World War II. NATO SOFA, *supra* note 10. The United States/Japan SOFA was signed in January 1960, roughly fifteen years after World War II. Japan SOFA, *supra* note 10. Finally, the U.S. ROKA SOFA was signed in 1966, roughly thirteen years after the Korean War. Korea SOFA, *supra* note 10.

107. Steven Lee Meyers & Sam Dagher, *Storm of Violence in Iraq Strains Its Security Forces*, N.Y. TIMES, Apr. 24, 2009, at A1, available at <http://www.nytimes.com/2009/04/25/world/middleeast/25iraq.html?bl&ex=1240891200&en=ce91d53e13153eed&ei=5087>. The article begins by describing how “[a] deadly outburst of violence appears to be overwhelming Iraq’s police and military forces as American troops hand

The use of a SOFA to define a military mission for U.S. forces for internal defense of the Iraqi government is a significant break with established practice because SOFAs normally do not address the use of American military power against external or internal threats to the governments that host the permanent presence of the U.S. Armed Forces What is notably absent from the NATO Treaty and the content of the existing status of forces agreements with Germany that flow from it is any reference to the use of U.S. military power inside or on the territory of Germany against internal enemies of the German government. In Germany (and Korea) where U.S. Forces are stationed, the governments are strong, legitimate and secure their own borders.¹⁰⁸

Even under the terms of the SOFA, U.S. forces are still operating in Iraq in ways completely different than in other countries with which the U.S. has SOFAs. Armed U.S. soldiers do not man checkpoints in Germany; they do not raid houses in Japan, or stop and search vehicles and occupants in South Korea.¹⁰⁹ Yet U.S. forces take all these actions in Iraq, and will continue to do so for the foreseeable future. Were the Iraq SOFA to predicate jurisdiction on the traditional official duty paradigm, the result might well be unlimited disputes between the U.S. and Iraq stemming from the hundreds if not thousands of interactions armed U.S. soldiers have with Iraqi civilians each and every day.¹¹⁰

The irony is that while the conduct of day-to-day military operations in Iraq would lead to many more challenges of official duty determination were the NATO SOFA jurisdiction language used, the U.S. as the sending State would still control the determination and thus maintain primary jurisdiction. So even though comments about the differing operating environment the U.S. military finds itself in Iraq versus Germany, Japan, and Korea may be accurate, frankly they are of little relevance to the question of criminal jurisdiction. Armed U.S. soldiers

over greater control of cities across the country to them.” *Id.* The article referred to a series of attacks in and around Baghdad, which in a 24-hour period in April 2009 killed almost 150 people. *Id.*

108. *The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq and for Congressional Oversight: Hearing Before the Subcomm. on Int’l Org., Human Rights, and Oversight*, 110th Cong. 152 (2008) (Statement of Douglas Macgregor, PhD, Colonel (ret) U.S. Army, Straus Military Reform Project Center for Defense Information).

109. That the reality on the ground involves combat missions is not only a departure from traditional SOFAs but part of the rationale by which Rush argues that the agreement should not be considered a SOFA. Rush, *supra* note 2.

110. For example, in April, 2009, Iraqi Prime Minister Nuri Al-Maliki accused U.S. soldiers of violating the SOFA following a raid in which U.S. troops purportedly killed two Iraqis. *See Iraqi leader: U.S. Raid That Killed 2 Breached Accord*, CNN, Apr. 26, 2009, <http://www.cnn.com/2009/WORLD/meast/04/26/iraq.troops.raid/index.html>. The Iraq SOFA requires that military operations, like the raid, be conducted with the agreement of the Government of Iraq. Iraq SOFA, *supra* note 1, art. 4(2). According to the CNN story, the U.S. claims that the raid was fully coordinated and approved by the Iraqi government.

do not routinely interact with foreign nationals in Germany, Japan, and Korea, so the opportunity for criminal misconduct that has a nexus to official duty to arise is more limited. Yet performing tactical missions like raids, checkpoints, and searches in and among Iraqi civilians is the official duty of U.S. service members, so under the NATO SOFA's jurisdiction framework, the U.S. could quite plausibly assert primary jurisdiction over almost any negligence based incident which followed.¹¹¹

What then does the shift to the duty status construct accomplish for the U.S. that the NATO SOFA does not? In short, it ensures the U.S. of primary jurisdiction over its service members in all instances, notably including wanton criminal misconduct like that in Yousifiayah. That the U.S. is so committed to the rights of its service members, rapists and murderers included, is on one level commendable. Whether or not the U.S. is willing to pay the political price which will be exacted by claiming that the SOFA affords it primary jurisdiction over a U.S. soldier who allegedly raped and murdered an Iraqi girl because that soldier was in a duty status remains to be seen. The American public would likely vehemently object to Iraq having jurisdiction over U.S. soldiers who were negligent at a checkpoint and shot an Iraqi civilian they thought might be an insurgent. That same public however, may care little, or not as much anyway, for the rights of an American soldier who commits horrific crimes completely detached from official duty.

Indeed irony abounds. Many commentators believe that Iraq "won" the SOFA negotiations with the United States¹¹² and President Obama stresses that Iraqis "need to take responsibility for their country and for

111. The U.S. assertion of official duty may extend to reckless offenses committed in the course of official duties.

112. See LYDIA KHALIL, *NOBODY'S CLIENT: THE REAWAKENING OF IRAQI SOVEREIGNTY* 1 (March 2009), <http://www.lowyinstitute.org/PublicationPop.asp?pid=992> (claiming that "Iraq is on the cusp of regaining full sovereignty after negotiating a SOFA that stipulates an end to the U.S. military's free rein in Iraq"); Chris Weigant, *A Close Look At The Iraq Status Of Forces Agreement [Part I]*, THE HUFFINGTON POST, Dec. 8, 2008, http://www.huffingtonpost.com/chris-weigant/a-close-look-at-the-iraq_b_149468.html (stating that "the Iraqis got almost everything they had pushed for, and the Bush administration got almost nothing of what they wanted. This agreement was tailored for Iraq's political situation, and not America's"); Dennis Steele, *Iraq: A Parade Delayed*, ARMY MAGAZINE 41 (2009) (stating that "[a]fter protracted negotiations by its signatories, the SOFA gave Iraq what it wanted most: more authority and the trappings of sovereignty over American military action—in the view of Iraqis, respect. The United States chiefly settled for what it needed most: breathing room.").

their sovereignty”;¹¹³ the reality is that Iraq has little more chance of obtaining jurisdiction over U.S. service members now than before the SOFA.¹¹⁴ Perhaps there will not be an incident of U.S. service member misconduct that tests the meaning and effect of the duty status language. Given that the Iraq SOFA also provides for the withdrawal of U.S. forces,¹¹⁵ perhaps so. Yet in the interim, over 100,000 U.S. soldiers will be stationed in Iraq; with that many soldiers, the prospects of an incident seem high. Moreover, despite those SOFA provisions calling for all U.S. troops to leave Iraq, the current U.S. commanding officer envisions a need for up to 30,000 U.S. troops in Iraq until as late as 2015.¹¹⁶

Waiting for the almost inevitable criminal misconduct to bring the issue of duty-status-predicated jurisdiction to the forefront means attempting to resolve the issue in the midst of round-the-clock news coverage of the incident and political posturing from both sides. That is hardly an environment fostering the sense of cooperation needed to confront and resolve the issue.¹¹⁷

113. *Time For Iraq to Step Up, Obama Says*, UNITED PRESS INTERNATIONAL, Apr. 7, 2009, http://www.upi.com/Top_News/2009/04/07/Time-for-Iraq-to-step-up-Obama-says/UPI-19871239114690/.

114. While the concept of predicating Iraq’s jurisdiction over U.S. service members rendering such jurisdiction a nullity is not widely accepted, at least one news story has acknowledged as much. Ernesto Londoño & Zaid Sabah, *Deaths in U.S. Raid Elicit Anger in Iraq: Premier Threatens to Prosecute Troops*, WASH. POST, Apr. 27, 2009, at A6 (referring to U.S. officials as saying that the qualifiers to Iraq’s primary jurisdiction “effectively means American soldiers will never face Iraqi justice.”).

115. Iraq SOFA, *supra* note 1, art. 24 (1) (stating that “[a]ll the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.”). In terms of the possibility of U.S. Forces being in Iraq beyond that date, Article 30 of the SOFA provides for the possibility of amending the SOFA. *Id.* art. 30. In terms of the possibility of U.S. forces leaving Iraq before the date, see discussion *supra* note 4.

116. Thomas E. Ricks, *The War in Iraq Isn’t Over. The Main Events May Not Even Have Happened Yet*, WASH. POST, Feb. 15, 2009, at B1; see also Craig Whitlock, *U.S. Plans for Possible Iraq Exit Delay*, WASH. POST, Feb. 23, 2010, at A8, available at http://www.washingtonpost.com/wpdyn/content/article/2010/02/22/AR2010022202933.html?wpisrc=nl_headline (discussing contingency planning by the U.S. Army to delay the withdrawal of combat forces from Iraq); *Iraqi Leader Willing to Ask Some U.S. Troops to Stay*, CNN, Mar. 4, 2010, <http://edition.cnn.com/2010/WORLD/meast/03/04/iraq.us.withdrawal/index.html?eref=edition> (quoting the Iraqi Prime Minister as “absolutely” willing to have U.S. forces extend their presence in Iraq).

117. The starting point may be the SOFA’s Joint Committee and the provision in the jurisdiction article which mandates review of the article every six months. Iraq SOFA, *supra* note 1, at art. 12 (10). But this is the same Joint Committee which has not yet enumerated grave premeditated felonies. See discussion *supra* note 11.

VI. CONCLUSION

Acts based SOFA jurisdiction allows the U.S. to assert jurisdiction over its service members when their criminal misconduct stems from their official duties. Through the duty status construct of the Iraq SOFA, the U.S. is attempting to extend its jurisdictional reach to all service member misconduct, even that misconduct without a nexus to official duties. Obtaining jurisdiction over outright criminal misconduct against Iraqi civilians is possibly borne out a desire to protect U.S. service members from the Iraqi judicial system. But in doing so, the U.S. may weaken its ability to assert jurisdiction where it should matter most, such as in situations where the misconduct arises from a U.S. soldier performing difficult missions in an ever changing tactical environment. Ultimately the U.S. may have undermined itself, not just in Iraq, but in every future country in which the U.S. deploys its military and negotiates criminal jurisdiction over U.S. service members with other countries.¹¹⁸

118. The most obvious example of where the repercussions from the duty status jurisdiction construct of the Iraq SOFA may be felt is Afghanistan, where although there is an agreement between the United States and Afghanistan currently in force, that agreement is limited in scope and purpose and may be replaced. *See* CRS, *supra* note 2, at 13–15.

